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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 683

GLADYS W. SIMPSON, *Petitioner,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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February, 1959

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Gladys W. Simpson prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit entered in the above entitled cause.

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit has not yet been reported, and is printed in the Appendix to this petition at page 1a, *post.* There is no written opinion of the District Court; the Findings of Fact, Conclusions of Law and Judgment of

the District Court are printed in Appellant's Supplemental Appendix filed below, pages 6-12, filed with this petition.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on November 7, 1958, and is printed in the Appendix to this petition at page 11a, *post*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a sum of money received by petitioner in 1951 was "compensation for personal service", includible in her gross income for purposes of the federal income tax imposed that year, or was a "gift" exempt from said tax.

STATUTE INVOLVED

Section 22 of the Internal Revenue Code of 1939 (53, Part 1, Stat.), applicable to petitioner's taxable year 1951, provides in part, as follows:

> Sec. 22. GROSS INCOME.
>
> "(a) *General Definition.*—'Gross income' includes * * * compensation for personal service * * * of whatever kind and in whatever form paid * * *
>
> "(b) *Exclusions from Gross Income.* The following items shall not be included in gross income and shall be exempt from taxation under this chapter:
>
> * * * * * *"
>
> "(3) *Gifts* * * * the value of property acquired by gift. * * *"

The verbatim text is set forth at page 12a, *post*.

STATEMENT

Petitioner's husband had been employed by a corporation for 52 years, until he died on January 16, 1951. The salary earned by the husband prior to his death had been fully paid to him and to his estate and at the time of his death there was no legal obligation of the corporation to pay him, his estate or his widow any additional compensation for or on account of his services during his lifetime. Petitioner received a payment of $33,750 from the corporation on February 5, 1951. Said sum was the equivalent of nine months salary of the husband at the rate in effect at the time of his death. Petitioner has never been an employee, officer, director, agent or stockholder of and has never rendered services of any kind to the corporation. She has never given consideration of any kind, cognizable in the contract *law* of "consideration," for the payment received by her. Petitioner included said sum in gross income reported in her federal income tax return for 1951. She timely filed a claim for refund of tax on the ground that said sum was a gift to her, but the claim was disallowed by the Internal Revenue Service. She sued for the refund in the United States District Court, Southern District of Illinois, which found that jurisdiction of the action exists by virtue of Section 1340 and Section 1346 of Title 28 of the United States Code.

The District Court ordered that Judgment be entered in favor of petitioner, based on the Court's findings of fact and conclusions of law that the payment received by taxpayer constituted a gift to her, and was therefore excludible from her gross income for 1951. On the government's appeal, the Court of Appeals reversed the Judgment of the District Court on the

grounds that the payment was not intended as a gift to the widow and Section 22(a) is broad enough in its definition of "gross income" to include the payment in question. One of the judges of the Court of Appeals disagreed with the other two judges and said he would affirm the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision of the Court below is portentous of a gross injustice to petitioner in the instant case. It stands alone in conflict with the unanimity of 38 or more court decisions, most of them rendered during the past 3 years in favor of widows in analogous cases. In particular, it is directly in conflict with the PER CURIAM decision of the United States Court of Appeals for the Sixth Circuit in the case of *United States* v. *Bankston* (dated May 5, 1958), 254 F. 2d 641 (in which case the government did not petition this Court for certiorari), and it is directly in conflict with the decision of the United States Court of Appeals for the Fourth Circuit in the case of *Bounds* v. *United States* (dated December 15, 1958), F. 2d . In both of these cases the Courts held that the payments constituted non-taxable gifts to the widows. So far as concerns a widow recipient such as petitioner, these two Court of Appeals cases and the instant case are alike in the facts material to consideration of the question presented, notwithstanding the distinction which the Fourth Circuit Court in the *Bounds* case attempted to draw in view of the decision of the Seventh Circuit Court in the instant case.

In 18 or more cases, the District Courts have decided the question in favor of the widows. See for examples *Rodner* v. *United States*, 149 F. Supp. 233, and *Allinger*

et al. v. United States (D.C.E.D. Mich. Nov. 17, 1958), F. Supp. . The Courts in these 18 cases are located in 6 of the 10 circuits: Second (1 case), Fifth (4 cases), Sixth (6 cases), Seventh (3 cases), Eighth (1 case) and Ninth (3 cases).

In 15 or more cases, the Tax Court has decided the question in favor of the widows. See for examples *Louise K. Aprill*, 13 T.C. 707, *Est. of Albert W. Morse*, 17 TCM 261 and *Estate of Arthur W. Hellstrom*, 24 T.C. 916.

It is important that this conflict be resolved in order not only that injustice to petitioner be prevented but that the lower courts and the Treasury Department may be certain whether the rule applied in the aforesaid 33 cases applied to all years under IRC 1939, as amended. If such were the law at the time of enactment of IRC 1954, *then it is clear from the text and legislative history of IRC 1954 that Section 101(b) did not change the existing law applicable to gratuitous payments by employers to the widows of deceased employees.* The language of the new exemption provided in Section 22(b)(1)(B), which was added to IRC 1939 by Section 302 of the Revenue Act of 1951, and which was broadened by Section 101(b), IRC 1954, and the legislative history thereof, clearly establish that in both enactments Congress was conferring a limited exemption upon payments *which theretofore had not been exempt from taxation.*

At least one District Court has expressed the opinion that while gratuitous payments to widows were exempt from taxation in *all* years subject to IRC 1939, as amended, *Section 101(b), IRC 1954, changed this. Rodner v. United States*, 149 F. Supp. 233, 237. Thus,

obiter dictum (the case involved the taxable year 1952), the Court reasoned as follows:

> "* * * Section 101(b) * * *: eliminates the provisions limiting to contractual death benefits the application of the $5,000 exemption. To me the effect of this would seem to be to withdraw the complete exemption that gratuitous death benefits had enjoyed and to substitute an exemption up to $5,000. In the complete revision effected by the 1954 Code the general language exempting gifts is controlled by the particular language of Section 101(b) limiting the exemption of death benefits to $5,000. Gifts in general are exempt but gifts in the form of death benefits are taxable insofar as they exceed $5,000." (Id. 237)

If this interpretation is sound, it should today produce acute anxiety to many legions of married women and it may lead to bitter results to many, many widows, and their families. For, by the same process of interpretation, payments received by widows upon the deaths of husbands who at the time of death were covered by their employers' group life insurance contracts providing for such payments on the death of the employees to their beneficiaries, such payments being generally exempt under Section 101(a)(1), would be subject to the more specific language of Section 101(b). Cf. *Ginsberg & Sons v. Popkin*, 1922, 285 U.S. 204, 208, wherein this Court said:

> "* * * General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. *United States* v. *Chase*, 135 U.S. 255, 260. Specific terms prevail over the general in the same or another statute which otherwise might be controlling.

Kepner v. *United States*, 195 U.S. 100, 125; In re *Hassenbusch*, 108 F. 35, 38; *United States* v. *Peters*, 166 F. Ed. 613, 615. * * *"

To illustrate, the Federal Employees' Group Life Insurance Act (5 U.S.C. § 2091) provides for insurance of appointive or elective officers or employees (all of them called "employees" for that purpose) in or under the Executive, Judicial or Legislative Branch of the United States Government, for an amount of group life insurance approximating each employee's annual compensation not exceeding $20,000. Clearly, if the receipt by a civilian widow of a gratuitous payment to her by her deceased husband's employer is covered by Section 101(b), so is a receipt by the beneficiary of a deceased government employee under a Federal Group Life Insurance policy plainly covered. This Court has said, however, that it will not follow the plain meaning of the words of a statutory provision if to do so produces an unreasonable result, plainly at variance with the policy of the legislation as a whole. *U. S.* v. *American Trucking Associations*, 310 U. S. 534, 542-543; *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479.

Without a decision of this Court that payments such as the one in question were gifts exempt from the tax imposed by IRC 1939, as amended, the wives as well as widows of employees covered by group life insurance plans,—the Courts and the Treasury Department,—will be greatly uncertain whether payments under such plans are free of the $5,000 limitation imposed by Section 101(b), IRC 1954, just as much as widows of employees who receive gratuitous payments in taxable years subject to IRC 1954 may well be uncertain. To illustrate, in Technical Information Release No.

87, published August 25, 1958, the Revenue Service announced a "new litigation policy" due to a "number of adverse court decisions". The announcement implied that the Service will continue to litigate cases (under IRC 1939) of payments by employers to widows of employees pursuant to a "plan" of the employee in effect before the husband's death. More significant, however, *and notwithstanding IRC 1954 has been in effect over 4 years,* the Release concludes with the sentence reading as follows:

> "The position of the Service with respect to cases in this area arising under the Internal Revenue Code of 1954 *involves other questions* and will be made the subject of a future announcement." (Italics supplied)

If this Court denies certiorari in the instant case, widow recipients and many others will have cause to be worried how far the Revenue Service will go in formulating its "position" in IRC 1954 cases, in view of such fact of denial of certiorari together with the fact of the *dictum* of the court in *Rodner* case, *supra.*

Another unreasonable result of any such literal interpretation of Section 101(b) as suggested in the *Rodner* case, *supra,* is that it would approve of changes in tax exemptions which have been in the law for upwards of half a century, without any evidence that Congress intended such changes and without any evidence that taxpayers were forewarned and had an opportunity to be heard on such drastic changes in the long established law. Compare the open and above-board action of Congress in Section 105 of IRC 1954, wherein the long established exemption for amounts received by employees under their employers' accident

and health plans was sharply limited not to exceed $100 per week. In the case of this exemption, the legislative history as well as the language of the statute leaves no room for question that Congress intended and provided for such limitation on the amount of the receipt exempt from tax. In this connection, we point out that though the law had thus been settled by Congress in IRC 1954, this Court on October 8, 1956, granted certiorari and on April 1, 1957 reversed the judgment of the lower court in the case of *Haynes* v. *United States*, 352 U.S. 820, 353 U. S. 81 (involving the taxable year 1949), which lower court decision had erroneously upheld the government's restrictive interpretation of Section 22(b)(5) of the 1939 IRC.

2. The aforementioned unanimity of 33 or more decisions of the Courts in favor of widows in like cases during the period 1949 to 1958 had, until the decision of the Seventh Circuit Court in the instant case, gone far in restoring integrity to the federal income tax law and its administration with respect to payments to widows such as the one in question. It is important that that integrity be *fully* restored by a decision of this Court in the instant case.

Integrity obtained unquestionably, from 1914 to 1950. In the latter year, however, the Revenue Service took the "position" that payments like the one in question in the instant case, are taxable income. Many widows went to Court about it, and the Government has suffered defeat in *all* cases to date, except the instant case. In the *Bounds* case, *supra*, the Court of Appeals, observing that the so-lately-assumed position of the Government has been "severely battered in litigation", expressed a not-so-soft impeachment of the Government for pressing its position any further in litigation

of such cases. Moreover, there are *no* signs whatever that Congress or its Committees have in any way approved of this position of the Government. On the contrary, there are indications that they have been aware of the position and have *not* approved it. Thus, significant events occurring during the period 1949 to 1958, are set forth in chronological order as follows.

The question as to taxability of gratuitous payments to widows as in the instant case, first arose in view of the language of the Income Tax provisions of the Act of October 3, 1913, the relevant portions of which are quoted as follows:

"Section II

* * * * *

"B. * * * the net income * * * shall include * * * compensation for personal service of whatever kind and in whatever form paid, * * * but not the value of property acquired by gift, * * *" (38 Stat. 114, 166-167)

A Treasury Decision approved by the Secretary of the Treasury, W. G. McAdoo, on December 14, 1914, decided the question in a rule, the relevant portion of which is quoted as follows:

"*Gratuity.*—Where the monthly salary of an officer or employee is paid for a limited period after his death to his widow in recognition of the services rendered by her husband, no services being rendered by the widow, it is held that such payment is a gratuity and exempt from taxation under the income tax law. * * *" T.D. 2090, Part I, Treasury Decisions, Internal Revenue, Volume 16, Jan.-Dec. 1914, page 267.

During the latter half of 1921, the Bureau of Internal Revenue ruled very briefly, the ruling is quoted in its entirety as follows:

> "A corporation paid to the widow of a deceased officer a certain amount equal to the salary he would have earned in two months. The payment was without consideration, a gratuity voted as a compliment to the deceased. It is held that the payment does not constitute taxable income." (O.D. 1017, C.B. No. 5, 101)

In the latter part of 1939, the Bureau issued a ruling concerning certain "non-compulsory" payments by an employer to the widow of a deceased employee, the pertinent portions of which are quoted as follows:

> "* * * A, a minority stockholder and salaried officer of the M Company, died on January — 1937. During 1937 the M Company paid to B, his widow, X dollars a week, a total of 52 X dollars for the year, which was the amount of salary A would have drawn had he lived. During 1938 the payments to B were X dollars a month, or 12 X dollars for the year. * * *
>
> "The amounts constitute gifts to B and are, therefore, not taxable income to her. * * *" (I.T. 3329, C.B. 1939-2, 153)

On November 8, 1949, in the first decision of a court in a case like the instant case, the Tax Court of the United States held the payments to the widow therein involved, to be gifts exempt from tax. *Louise K. Aprill*, 13 T.C. 707.

The above-quoted language of the 1913 Act (page 10, *ante*) was continued without relevant change in the succeeding Revenue Acts, to and including IRC 1939, quoted at page 2, *ante*; and the rule of T.D. 2090 con-

tinued without change. This Court said in *Helvering v. Winmill*, 305 U.S. 79, 83, that—

> "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and *have the effect of law*." (Italics supplied)

On September 12, 1950, the Commissioner of Internal Revenue, with the approval of the Acting Secretary of the Treasury, issued I.T. 4027 (C.B. 1950-2, 9), applicable to payments received by widows after January 1, 1951, the relevant portions of which are quoted as follows:

> "It is the position of the Bureau that irrespective of a 'plan', voluntary or involuntary, definite or indefinite, payments of the type herein considered constitute taxable income, and it is held that payments made by an employer to the widow of a deceased officer or employee, in consideration of services rendered by the officer or employee, are includible in the gross income of the widow for Federal income tax purposes. Accordingly, O.D. 1017, *supra*, is revoked. I.T. 3329, *supra*, is modified and the paragraph entitled '*Gratuity*' in Part I of Treasury Decision 2090, approved on December 14, 1914 will no longer be followed."

The Senate Finance Committee Report dated September 18, 1951, to accompany H.R. 4473, the Bill to enact the Revenue Act of 1951, stated that the Committee had added a new exclusion from gross income to the House Bill, the provision being entitled "Death Benefits to Employees". The Report explained this new provision as follows:

> "Section 22(b)(1) of the Code excludes from gross income amounts received under a life insur-

ance contract paid by reason of the death of the insured, whether in a single sum or otherwise. However, by its terms, this provision is limited to life-insurance payments, and the exclusion does not extend to death benefits paid by an employer by reason of the death of an employee. In order to correct this hardship, section 302 of your committee's bill excludes from gross income death benefits not in excess of $5,000 paid by any one employer with respect to any single employee's beneficiary or beneficiaries *in accordance with a preexisting contract.* The limitation of the exclusion to payments not in excess of $5,000 will prevent abuses under this new provision. (Italics supplied)

"This provision is effective with respect to taxable years beginning after December 31, 1950." S. Rept. No. 781, page 50 (82d Cong. 1st Sess.)

Accordingly, Section 302 of the Revenue Act of 1951, approved October 20, 1951 (65 Stat. 452), amended Section 22(b)(1) of IRC 1939, applicable with respect to taxable years *beginning after December 31, 1950,* to add a new and specific exemption from taxation for amounts not exceeding $5,000 received by beneficiaries of deceased employees, namely, Section 22(b)(1)(B), the pertinent portion of which is quoted as follows:

"* * * Amounts received—* * * (B) *under a contract of an employer* providing for the payment of such amounts to the beneficiaries of an employee, paid by reason of the death of the employee; * * *" (Italics supplied)

On October 9, 1952, in another case like the instant case, the Tax Court held the payment to the widow was a gift exempt from tax. *Alice M. Macfarlane*, 19 T.C. 9. In the early part of 1953, the Commissioner of Internal Revenue "acquiesced" in this decision.

but with the notation that his acquiescence was "not applicable to payments received *after December 31, 1950.*" (1953-1, C.B. 5)

On June 17, 1953, T.D. 6020 (C.B. 1953-2, 106), which amended Regs. 111 to conform to Section 302 of the Revenue Act of 1951, contained an interpretation of the hereinabove quoted language of Section 22(b)(1)(B); namely, it interpreted the language to confer the exemption upon—

> "Amounts, not in excess of $5,000, paid by an employer in pursuance of an *express* contract, to the estate or to a beneficiary * * * of an employee * * *." (Id. 107) (Italics supplied)

The Regulation further provided that

> "An *express* contract * * * shall be deemed to exist only if (1) the *employer and employee had entered into a written contract, not revoked before the employee's death*, which required such payment, or (2) *the employer had an established plan* (or program having the effect of a plan) making provision for such payments in the case of his employees generally or for a class or classes of his employees. In the latter case, * * * *provided such plan had been communicated to such employees.* * * *" (Italics supplied)

The House Ways & Means Committee Report dated March 9, 1954, to accompany H.R. 8300, the Bill to enact the IRC of 1954, calling attention to various restrictive interpretations of Section 22(b)(1)(B) of IRC 1939, as amended, proposed certain changes in the law, and as to one particular change made an explanatory statement, the pertinent portions of which are quoted as follows:

"Present law provides a special exclusion of up to $5,000 for payments by an employer to beneficiaries of a deceased employee. Under existing law, however, *this* exclusion is available only where the employer is under a contractual obligation to pay the death benefits. * * *

"Restricting the exemption to benefits paid under a contract discriminates against those who receive benefits where this contractual obligation does not exist. To avoid this problem your committee's bill extends this exclusion to death benefits whether or not paid under a contract. * * *" (H. Rept. No. 1337, page 14 (83d Cong., 2d Sess.)

The Senate Finance Committee Report dated June 18, 1954, adopted this House provision emphasizing that,—

"The exclusion is also made available regardless of whether the employer has a contractual obligation to pay the death benefits." (Id. 14)

IRC 1954 (68 A Stat. 12) reenacted the relevant language of the statute involved in the instant case, quoted at page 2, *ante*, without substantial change, as follows:

"Sec. 61. GROSS INCOME DEFINED.

"(a) *General Definition.*—* * * gross income means all income from whatever source derived, including * * *:

"(1) Compensation for services * * *

"Sec. 102. GIFTS * * *

"(a) *General Rule.*—Gross income does not include the value of property acquired by gift. * * *"

At the same time, IRC 1954 changed the pertinent portion of the IRC 1939 exemption of *contract* payments to beneficiaries of an employee not exceeding $5,000, to read as follows:

"Sec. 101. CERTAIN DEATH BENEFITS.

* * * * *

"(b) Employees' Death Benefits.—

"(1) General Rule.—Gross income does not include amounts received (whether in a single sum or otherwise) by the beneficiaries or the estate of an employee, if such amounts are paid by or on behalf of an employer and are paid by reason of the death of the employee."

Perhaps the most significant event occurred in 1955, when the Revenue Service ruled (Rev. Rul. 55-609, C.B. 1955-2, 34) in effect (and *without any indication of approval by the Secretary of the Treasury*) that it would not follow I.T. 4027 (*which had been approved by the Acting Secretary of the Treasury* and which stated that the Revenue Service would not "follow" T.D. 2090, *supra*). In effect, Rev. Rul. 55-609 "*follows*" T.D. 2090. In effect, it granted an exception from I.T. 4027, *supra*, for death gratuitous payments specifically authorized by Congress by the Third Supplemental Appropriation Act of 1952 *or any other Act or at any time made out of the contingent fund of the House of Representatives or of the Senate*,—the Revenue Service ruled that any *such* payments are gifts, excludible from gross income of the recipient thereof for federal income tax purposes, and are not includible in the gross estate of the decedent for federal estate tax purposes! Death gratuitous payments to widows by *other* employers, however, appear to continue to be subject to assessment of tax and enforce-

ment of collection by court order—in the latter part of 1957, the Commissioner withdrew his acquiescence in the Tax Court decision in *L. K. Aprill, supra,* and substituted his "non-acquiescence"! (1957-2, C.B. 8-9). And, in Technical Information Release No. 87 published August 25, 1958, the Revenue Service implied that it will continue to litigate under IRC 1939, cases of payments made to widows "pursuant to a plan" of the employer in effect before the husband's death, regardless that the employer had no legal liability to make the payment to the widow.

The foregoing events during the period 1949 to 1958 present even more compelling reasons for grant of the writ than appeared in the *Haynes* case, *supra.* The Internal Revenue Code of 1954, with due notice to taxpayers, had already openly and directly settled the law in the respect questioned in the *Haynes* case. In the instant case, IRC 1954 did not settle the law in the respect questioned herein.

3. The judgment of the Court below is unjust. The decision stands alone in conflict with the decisions above referred to on pages 4-5, *ante,* all of which decisions are believed to be correct. The decision of the Court below is predicated on the rule of the decision of this Court in *Bogardus* v. *Commissioner,* 302 U.S. 34, 43, that intention of the payor governs decision whether the payment received is a gift or compensation to the recipient; and the *dictum* in the decision of this Court in *Old Colony Trust* v. *Commissioner,* 279 U.S. 716, 730, to the effect that legal obligation of the payor to make the payment is not necessary to characterize the payment as compensation to the recipient. The facts of these two

cases, however, differ in a vital respect from the facts of the instant case. In those cases, the recipients of the payments were individuals who had performed the services as employees. In the instant case, the recipient widow, petitioner, never was an employee, never performed any services and never gave any other legal consideration for the payment. Petitioner's husband was an employee and during his lifetime rendered the only services to which the payment in question could in any way be related; however, at the time of his death his services were compensated in full,—the monthly installments of salary for 1950 had been paid directly to him; his salary for January, 1951 (he died on the 16th day) was paid to his estate. His employer was not legally obligated to pay him or his estate any further salary or other additional compensation for his services; and when the employer made the payment in question to his widow, he, of course, was dead,—he was beyond the reach of even a gratuitous payment to him or to a beneficiary designated by him, as additional compensation for his past services. The payment in question was not income to him or to his estate and was not includible in his gross estate for federal estate tax purposes, since neither he nor his estate ever had a legal right to receive or other property interest in the amount of the payment. Cf. Rev. Rul. 55-609, *supra* (page 16, *ante*). Such being the case, it is wholly erroneous, as a matter of fact and of law to speak of the payment as being "compensation for services". Petitioner performed *no* services and gave no other consideration to which the payment could possibly be related for purposes of justifying the levy upon *her* rather than upon her husband or his estate, of the *drastic* federal income tax *imposed upon her—not* imposed upon her husband or his estate!

The language "compensation for personal service", as used in Section 22(a), cannot reasonably be construed to require inclusion of the payment in question in petitioner's gross income.

WHEREFORE, petitioner prays that a writ of certiorari issue to review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully,

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February, 1959

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 12275-76

September Term, 1958 September Session, 1958

GLADYS W. SIMPSON, *Plaintiff-Appellee*,

v.

UNITED STATES OF AMERICA, *Defendant-Appellant*.

Appeal from the United States District Court
for the Southern District of Illinois.

November 7, 1958

Before FINNEGAN, SCHNACKENBERG and PARKINSON, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Defendant[1] has appealed from a judgment entered in the district court in favor of plaintiff,[2] in her suit against the government to recover part of her income tax paid for the year 1951, on the ground that a payment of $33,750 to her from the Mueller Company, of which her deceased husband had been an executive, was not income but was a gift under the exclusion provisions of section 22(b) (3) of the Internal Revenue Code of 1939. The district court held that the payment was a gift.[3]

From the district court's findings of fact, the undisputed testimony and exhibits, the following statement of facts is constructed.

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[1] Herein also referred to as the government.

[2] Herein also referred to as the taxpayer.

[3] One of the two numbers given this appeal relates to an ineffective attempt to appeal from an order which found the issues for plaintiff.

Prior to January 16, 1951, J. Wilbur Simpson and taxpayer were husband and wife residing in Decatur, Illinois. For 52 years, he had been employed by the Mueller Company,[4] and at the time of his death was a director, executive vice president, and a member of the executive committee.

On August 18, 1910, the board of directors of the corporation[5] adopted a resolution providing that it would "in case of the death of a Director in the active service of this company, for the benefit of his surviving widow, and children, * * * pay the widow, and in case of her death, the surviving children of any such deceased director, the usual and stipulated salary for the unexpired month, in which such death may occur, and also to pay monthly, for the period of six months thereafter, such salary * * *."

Thereafter, upon the decease of various company executives, the corporation's board of directors followed this policy by adopting resolutions in 1928,[6] 1940,[7] 1944[8] and 1947.[9]

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[4] Sometimes referred to herein as the corporation.

[5] Then known as H. Mueller Manufacturing Company.

[6] "RESOLVED: That this Company pay Mrs. Mary E. Mueller, widow of Mr. Philip Mueller, his usual and stipulated salary for the month of January and also for the period of six months thereafter, in accordance with the Resolution passed by the Board of Directors on August 18, 1910."

[7] "RESOLVED: That this company pay Mrs. Addie E. Mueller, widow of Mr. Robert Mueller, his usual and stipulated salary for the period of six months from April to September inclusive, in accordance with the resolution passed by the Board of Directors on August 18, 1910."

[8] "BE IT FURTHER RESOLVED: That in conformity with the previous practice in similar cases, as evidenced by the resolution adopted by this Board on February 3, 1928, and a similar resolution adopted after the death of Mr. Robert Mueller, that the salary, in the amount previously fixed by this Board, for Mr. Adolph Mueller, Chairman of the Board of Directors of the Company, be paid to the above mentioned Minnie B. Mueller, in recognition of services rendered by Adolph Mueller, to this company, for a period of six consecutive months, beginning June 1, 1944."

[9] "BE IT FURTHER RESOLVED: That in further recognition of services rendered to this company by William E. Mueller, and in conformity with the previous practices in similar cases, as evi-

Simpson died on January 16, 1951, at which time there was in effect a resolution, adopted by the executive committee on February 6, 1950, containing the following language:

"WHEREAS, this company for many years has followed a general policy of paying to the widow of a deceased executive, an amount equivalent to the salary for such executive, for a period as is evidenced by the resolution adopted by the Board of Directors of Mueller Co. on February 3, 1928; also by a similar resolution adopted after the death of Mr. Robert Mueller in March of 1940; also by a similar resolution adopted May 24, 1944, following the death of Mr. Adolph Mueller; and by a similar resolution adopted October 2, 1947, following the death of Mr. W. E. Mueller, and

"WHEREAS, it is the desire to restate the said existing policy in more explicit terms,

"THEREFORE, BE IT RESOLVED: That in pursuance of the aforesaid policy, and in consideration of services rendered to this company by Lucien W. Mueller, J. W. Simpson, Albert G. Webber, Jr., Frank H. Mueller, Clarence C. Roarick, Leo Wiant, Odie E. Walker, Emmett M. Reedy, J. L. Logsdon and LeRoy Evans, Mueller Co. will pay, in the event of the death of any or either of them, to his surviving widow, a sum equal to nine months salary of any of the last named executives, at their regular rate, at the date of death, upon and subject to the following terms and conditions:

1. Such payment shall be made only if said individual is an executive in good standing with Mueller Co. or any affiliate or subsidiary, regularly performing

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denced by the resolution adopted by this Board on February 3, 1928, and a similar resolution adopted after the death of Mr. Robert Mueller, and a similar resolution adopted May 24, 1944, after the death of Mr. Adolph Mueller, that the salary in the amount previously fixed by this Board for Mr. William E. Mueller, President of this corporation, be paid to the above mentioned Pauline V. Mueller for a period of six (6) months beginning October 1, 1947, and that such amount equal to the aforesaid six months salary be paid to her in a single sum."

the duties and responsibilities of the position held by him on the date of this resolution or those of a higher position to which he may be promoted after the date of this resolution. If such deceased executive is absent from his regular duties on a regularly recognized leave of absence, he shall be deemed covered by this policy.

2. Any payment hereunder will be only to the surviving widow of such decedent and if he leaves no widow surviving him, then no payment shall be made hereunder. By widow shall be meant a wife living with such executive at the time of his decease and not living separate and apart by reason of any legal proceeding or otherwise.

3. That no one named or referred to in this resolution shall acquire or be deemed to have any vested rights by virtue hereof; it being expressly understood that this company, acting by its directors, does not waive or relinquish its right to alter, modify, revoke or rescind this resolution at any time in whole or in part and before or after the death of any individual named or referred to herein."

Following the death of Simpson, taxpayer received a payment of $33,750 from the corporation under date of February 5, 1951, in pursance of the latter resolution.

The corporation charged the payment to an account called "Special Salaries", and deducted it as an expense. This deduction was allowed by the Internal Revenue Service.

Taxpayer has never been an employee, or owned stock, of the corporation. Simpson owned 1,500 shares out of 136,000 authorized, which were subject to a repurchase agreement and not disposable to anyone except the corporation.

The salary earned by Simpson prior to his death had been fully paid to him or his estate. In addition to the

payment in question here, taxpayer received in 1951 $6,893.37 from the Mueller Company pension trust, part of which was taxable and part excludable from income pursuant to a special ruling by the Commissioner of Internal Revenue.

The district court made findings of fact, that the corporation derived no benefit from the payment to taxpayer and that it intended to make a gift to taxpayer. The government disagrees with these findings. Otherwise the parties agree that the foregoing statement of facts is correct.

The government contends that the payment of $33,750 to taxpayer by the Mueller Company, of which her husband had been an executive until his death, was intended to be compensation rather than a gift. On the other hand, taxpayer insists that said payment was intended as a gift to her, and is, in fact a gift within the meaning of the Internal Revenue Code of 1939.

Section 22 (a) of the Internal Revenue Code of 1939[10] is broad enough in its definition of "gross income" to include the payment in question, unless it is covered by § 22 (b) (3)[11] which expressly excludes from gross income the value of property acquired by gift.

The sweeping scope of § 22 (a) is readily apparent. This language was used by Congress to assert in this field "the full measure of its taxing powers". *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 429. The Supreme Court has given a liberal construction to this broad phraseology in recogni[illegible] of the intent of Congress to tax all gains except those specifically exempted. The importance of the phrase "gains or profits and income derived from any source whatsoever" has been too frequently

[10] 26 U.S.C.A. 1952 Ed. § 22 (a).

[11] 26 U.S.C.A. 1952 Ed. § 22 (b) (3).

recognized to say now that it adds nothing to the meaning of "gross income", *ibid.* 430. While the income taxed is described in sweeping terms, the exemptions are specifically stated and should be construed with restraint. *Commissioner* v. *Jacobson*, 336 U.S. 28, 49.

The district court arrived at a conclusion of law that the payment in question by the corporation to taxpayer constituted a gift to her within the meaning of § 22 (b) (3) of the 1939 code and was, therefore, excludable from her gross income for that year. Whether we view this as a conclusion of law or a determination of a mixed question of law and fact, we have a right to review the record and substitute our findings and conclusions for those of the district court in the event we find the record warrants such action. We are not bound in situations such as this by Rule 52 (a) of the Federal Rules of Civil Procedure.[12] *Bogardus* v. *Commissioner*, 302 U.S. 34, 39; *Weible* v. *United States*, 244 F.2d 158, 161 (9 Cir. 1957); *Commissioner* v. *Fiske's Estate*, 128 F.2d 487, 489 (7 Cir. 1942).

As to the controverted findings of the district court that the corporation derived no benefit from the payment to the taxpayer and that the corporation, in making that payment, intended to make a gift to her, which are involved in the district court's conclusions of law, we believe that the district court erred.

We find from the record that the corporation did derive a benefit from the payment. It was made in pursuance of a long-established plan consistently followed by the corporation. Adherence to the plan demonstrates that these payments to the widows of deceased executives were made for the purpose of encouraging living executives to continue in their employment by the corporation. The fact that these executives were retained by the corporation is evidence that it was to the interest of the corporation

[12] 28 U.S.C.A. Rule 52 (a).

that they did not depart and take with them their training and experience in the company's affairs, developed during a long period of employment there. The plan was a means of retaining a valuable asset as long as possible. Insofar as the plan in question tended to deter the resignation of these key executives, it would be unrealistic to say that it was not for the benefit of the corporation.

We also find from the record that the corporation in making the payment in question to taxpayer did not *intend* to make a gift to her. No one contends that a donor has a right to deduct the amount of the value of a gift when reporting to the government for income tax purposes and such is not the law. Moreover the payments on the corporation's books were entered in an account known as "Special *Salaries*". It does violence to language to say that one who intends to make a gift enters the transaction on his books as a salary paid. Again, the resolution of February 6, 1950, under which the payment in question was made to taxpayer recites that the corporation would make the payment "in consideration of services rendered to this company * * * by J. W. Simpson". This is not the language of a gift. It was an authorization to pay out funds of the company for a consideration. A gift has no *quid pro quo*.

In law there is no presumption of a gift. This is true generally. It is supported by the strict provisions of §22 (b) (3), *supra*.

If this payment were a gift its only purpose could have been to help the widow of a deceased executive. Its amount would have been measured in the light of the needs of the widow. However, that was not the measure applied in making the payment. It represented a sum previously fixed and equal to the husband's salary for nine months, without consideration of the current needs of the recipient. *Bausch's Estate* v. *Commissioner*, 186 F.2d 313 (2 Cir.

1951); *Poorman* v. *Commissioner*, 131 F.2d 946 (9 Cir. 1942); *Willkie* v. *Commissioner*, 127 F.2d 953 (6 Cir. 1942).

While the resolution of 1950 attempted to protect the company from any legal obligation to make payments, it clearly imposed a moral obligation. As a practical matter, the company had to pay taxpayer in order to preserve its integrity in the eyes of the other executives whose wives were to receive similar payments in the future, and it never in fact tried to revoke the resolution or refused to make payment under it. In any event, legal obligation to pay is not necessary to characterize a payment as compensatory. *Old Colony Tr. Co.* v. *Commissioner*, 279 U.S. 716, 730. The important consideration is that the payment was made in pursuance of an established plan, which was just as effective as an incentive to induce executives to remain with the company as any legal undertaking on the part of the company to make such payments. *Bausch's Estate* v. *Commissioner, supra.*

The district court's findings that at no time was taxpayer a shareholder or an employee of the corporation, and performed no service for it, are irrelevant in a determination of whether the payment in question was a gift. The fact is that, in view of the existing plan, services were rendered to the corporation by Simpson.

The case of *Luntz* v. *Commissioner*, 29 T.C. No. 72 (1958), is relied on by taxpayer. Her reliance is not well-founded. It appears that in that case, after the death of the president of a steel corporation, its board of directors passed a resolution providing for, (1) a payment of "a temporary pension" to his widow, equivalent to his annual salary for two years and (2) a similar payment to the widows of two directors in the event of their husbands' deaths. The Tax Court held that, while the resolution set up a plan for the wives of the two living directors, the wife of the deceased president was not a member of that class. It disagreed with the contention of the Commis-

sioner of Internal Revenue that the resolution exhibited a plan including the president's widow. Consequently it held that the payment to her was a gift.

For the reasons above set forth, the judgment of the district court is reversed.

REVERSED.

FINNEGAN, *Circuit Judge*. Dissenting. This is one of those cases where the uncontroverted operative facts are so simple their meaning leads us off in divergent directions searching for etiological implications in a check given this widowed taxpayer by her deceased husband's employer. Mrs. Simpson's husband commenced working for the Mueller Company in August, 1899 and remained, save for an insignificant interval, with that Corporation until he died on January 16, 1951. Admittedly there was absent any legal obligation existing by and between Mueller and Mr. Simpson to pay over money to Mrs. Simpson on the death of her husband and a careful reading of the original transcript not only supports that fact, but shows an utter lack of any contrary evidence.

Mueller first articulated its policy of taking care of widows surviving their husbands, who had been employed by Mueller, through a resolution adopted by its Board of Directors on August 18, 1910. A footnote in the history of federal taxation will show the Sixteenth Amendment was ratified on February 25, 1913. And nothing in this record indicates that Mueller embarked on its policy with the aim of circumventing tax laws culminating in I. R. C. 1939.

Mueller's accounting treatment of the disbursement to Mrs. Simpson is beside the point when all we are deciding is whether she received taxable income or a gift. Names of accounts mean little in financial analysis unless, of course, we were confronted with some uniform system of

accounts prescribed by a regulatory body pursuant to enabling legislation. From the face of the record, and speaking from an accounting viewpoint, Mueller acquired no asset for the cash expended, and no liability had been discharged. But the Corporation's cash had been reduced and net worth must be similarly reduced in order for the debits to continue to equal the credits. See Shugerman, Accounting for Lawyers, 35 (1952). Even if Mueller charged an account, happily labeled "Gifts to Widows," the economic impact on the corporation would have been the same for it diminished its asset-cash and good accounting practice would require appropriate bookkeeping entries reflecting that change in cash and its offset. Mueller's duty to correctly reflect its financial position for its stockholders supersedes the need for some euphemistic account title congenial to Mrs. Simpson.

"'Expenses' is a word of broad import. It has no fixed definition. It is of varying signification and is dependent for its precise meaning upon its connection and the purpose to be accomplished by its use. It is comprehensive enough to include a wide range of disbursements. Standing alone, it is ambiguous. Its breadth of meaning shows the diversity of subjects which may be included within it." *Pittsfield & N. A. R. Corp.* v. *Boston & A. R. Co.*, 260 Mass. 387, 157 N.E. 611, 614 (1927). Whatever reason there might have been, and none appears of record, for allowing Mueller the payment to Mrs. Simpson as a deductible expense is irrelevant. This payment was obviously occasioned by Mr. Simpson's death not his past services.

Although this is an appeal from the district court much that was said concerning Rule 52, Federal Rules of Civil Procedure in *Wisconsin Memorial Park Co.* v. *Commissioner of Internal Revenue*, 255 F.2d 751, 754 (7th Cir. 1958) has pertinency here. The only way Mueller's voluntary payment can be hurdled is by penalizing Mrs. Simpson for suspected state of mind imputed to various Mueller

directors for the past 50 years. Instead of abandoning Rule 52 I would obey it and affirm the judgments. My position would be misunderstood if interpreted as opening the floodgates for tax avoidance in remotely similar situations. The key here lies in the record and particular facts.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois
Friday, November 7, 1958

BEFORE

HON. PHILIP J. FINNEGAN, *Circuit Judge*
HON. ELMER J. SCHNACKENBERG, *Circuit Judge*
HON. W. LYNN PARKINSON, *Circuit Judge*

Nos. 12275-76

GLADYS W. SIMPSON, *Plaintiff-Appellee*,

v.

THE UNITED STATES OF AMERICA, *Defendant-Appellant*.

Appeal from the United States District Court for the Southern District of Illinois

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause entered therein on November 27, 1957, appealed from be, and the same is hereby, REVERSED, in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that the appeal from the order entered on November 6, 1958 (appeal No. 12275) be, and the same is hereby DISMISSED.

Text of Statute Involved

Sec. 22(a) and Sec. 22(b)(3), (53 (Part I) Stat. 9, 10)

"SEC. 22. GROSS INCOME. **General Definition.**—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. In the case of Presidents of the United States and judges of courts of the United States taking office after June 6, 1932, the compensation received as such shall be included in gross income; and all Acts fixing the compensation of such Presidents and judges are hereby amended accordingly.

"(b) **Exclusions from Gross Income.**—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * * * *

"(3) **Gifts, Bequests, and Devises.**—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);"

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FILED
MAR 2 1959
JAMES R. BROWNING, Clerk

No. 683

In the Supreme Court of the United States

OCTOBER TERM, 1958

GLADYS W. SIMPSON, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (Supp. R. 6–11) are not reported. The opinion of the Court of Appeals (Pet. 1a–11a) is reported at 261 F. 2d 497.

JURISDICTION

The judgment of the Court of Appeals was entered on November 7, 1958. (Pet. 11a–12a.) The petition was filed on February 4, 1959. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether a payment made to petitioner by the Mueller Company after the death of her husband, who had been an executive of the company during his lifetime, constituted taxable income or a gift

under Section 22(b)(3) of the Internal Revenue Code of 1939.

STATUTE INVOLVED

Internal Revenue Code of 1939:

> Sec. 22 [as amended by Sec. 1, Public Salary Tax Act of 1939, c. 59, 53 Stat. 574, and Sec. 111(a), Revenue Act of 1942, c. 619, 56 Stat. 798]. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing) of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal; growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * * *
>
> (b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:
>
> * * * * * *
>
> (3) *Gifts, bequests, devices, and inheritances.*—The value of property acquired by gift, bequest, devise, or inheritance. * * *
>
> * * * * * *
>
> (26 U.S.C. 1952 ed., Sec. 22.)

STATEMENT

The facts taken from the District Court's findings of fact, the undisputed testimony, and exhibits are as follows:

Prior to January 16, 1951, J. Wilbur Simpson and petitioner were husband and wife residing in Decatur, Illinois. Simpson died on January 16, 1951. (Supp. R. 6.) For 52 years, Simpson had been employed by the Mueller Company, and at the time of his death was a director, executive vice president, and a member of the executive committee. (Supp. R. 6–7.)

On February 6, 1950, prior to Simpson's death, the executive committee adopted the following resolution (Supp. R. 7–8):

> WHEREAS, this company for many years has followed a general policy of paying to the widow of a deceased executive, an amount equivalent to the salary for such executive, for a period as is evidenced by the resolution adopted by the Board of Directors of Mueller Co. on February 3, 1928; also by a similar resolution adopted after the death of Mr. Robert Mueller in March of 1940; also by a similar resolution adopted May 24, 1944, following the death of Mr. Adolph Mueller; and by a similar resolution adopted October 2, 1947, following the death of Mr. W. E. Mueller, and
>
> Whereas, it is the desire to restate the said existing policy in more explicit terms,
>
> THEREFORE, BE IT RESOLVED: That in pursuance of the aforesaid policy, and in consideration of services rendered to this company by Lucien W. Mueller, J. W. Simpson,

Albert G. Webber, Jr., Frank H. Mueller, Clarence C. Roarick, Leo Wiant, Odie E. Walker, Emmett M. Reedy, J. L. Logsdon and LeRoy Evans, Mueller Co. will pay, in the event of the death of any or either of them, to his surviving widow, a sum equal to nine months salary of any of the last named executives, at their regular rate, at the date of death, upon and subject to the following terms and conditions:

1. Such payment shall be made only if said individual is an executive in good standing with Mueller Co. or any affiliate or subsidiary, regularly performing the duties and responsibilities of the position held by him on the date of this resolution or those of a higher position to which he may be promoted after the date of this resolution. If such deceased executive is absent from his regular duties on a regularly recognized leave of absence, he shall be deemed covered by this policy.

2. Any payment hereunder will be only to the surviving widow of such decedent and if he leaves no widow surviving him, then no payment shall be made hereunder. By widow shall be meant a wife living with such executive at the time of his decease and not living separate and apart by reason of any legal proceeding or otherwise.

3. That no one named or referred to in this resolution shall acquire or be deemed to have any vested rights by virtue hereof; it being expressly understood that this company, acting by its directors, does not waive or relinquish its right to alter, modify, revoke or rescind this

> resolution at any time in whole or in part and before or after the death of any individual named or referred to herein.

On February 5, 1951, following the death of Simpson, petitioner received a check from the Mueller Company in the amount of $33,750, in pursuance of the resolution (Supp. R. 7–8).

The company charged the payment to an account called "Special Salaries" (R. 31), and deducted it as an expense (R. 33). This deduction was allowed by the Commissioner. (R. 33.)

Petitioner at no time owned stock in the Mueller Company. Her husband owned 1,500 shares out of 136,000 authorized shares, which were subject to a repurchase agreement and not disposable to anyone except the company. (Supp. R. 8.) Petitioner has never been an employee of Mueller Company. (Supp. R. 9–10.)

The salary earned by petitioner's husband prior to his death had been fully paid to him or his estate. (R. 30, 35.) In addition to the payment in question, petitioner received in 1951 $6,833.37 from the Mueller Company pension trust, part of which was taxable and part excludable from income pursuant to a special ruling of the Commissioner. (Supp. R. 8–9.)

The District Court held that the payment to the petitioner was a gift and excludable from gross income. (Supp. R. 11.) The Court of Appeals reversed, one judge dissenting. (Pet. 1a–11a.)

ARGUMENT

This Court has given a liberal construction to the broad language of Section 22(a) of the Internal Revenue Code of 1939, *supra*, p. 2, holding that Congress thereby intended to exert the full measure of its taxing power. *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426. The Court has also held that exclusions, being specifically stated, are to be construed narrowly in the light of the same policy. *Commissioner* v. *Jacobson*, 336 U.S. 28. The court below properly applied these principles in the instant case, and no question of general importance is here presented.

There is no conflict with *United States* v. *Bankston*, 254 F. 2d 641 (C.A. 6th), and *Bounds* v. *United States* (C.A. 4th), decided December 15, 1958 (59-1 U.S.T.C. par 9159). The instant case was appealed by the Government and decided by the Court of Appeals on the theory that the petitioner received compensation which her husband earned prior to his death, knowing that if he remained in the employ of the corporation it would undoubtedly make the payment to his widow pursuant to a long-standing, formalized plan. The *Bankston* case involved the contention that payments to the widow constituted dividends. The Court of Appeals held that they did not; no issue of compensation was involved. In the *Bounds* case the Court of Appeals itself distinguished the present case on the ground that in *Bounds* there was no established plan of payments to the widows of the employees, but merely a spontaneous payment by the

corporation to the widow of the particular employee concerned. The Tax Court also has recognized the difference between a spontaneous payment to the widow of a deceased employee and a similar payment made pursuant to a stated plan adopted prior to the death of the employee. See *Luntz* v. *Commissioner*, 29 T.C. 647. The decision below also is not in conflict with any of the other cases cited by the petitioner, all of them being distinguishable on their facts.

Petitioner's concern with Section 302 of the Revenue Act of 1951, c. 521, 65 Stat. 452, and Section 101(b) of the Internal Revenue Code of 1954 is difficult to understand. Section 302 of the Revenue Act of 1951, applicable to the tax year involved here, amended Section 22(b)(1) of the 1939 Code to exclude from gross income the following:

> (1) *Life Insurance, Etc.*– Amounts received—
>
> * * * * *
>
> (B) under a contract of an employer providing for the payment of such amounts to the beneficiaries of an employee, paid by reason of the death of the employee,
>
> whether in a single sum or otherwise (but if such amounts are held by the insurer, or the employer, under an agreement to pay interest thereon, the interest payments shall be included in gross income). The aggregate of the amounts excludible under subparagraph (B) by all the beneficiaries of the employee under all such contracts of any one employer may not exceed $5,000.

Under Treasury Regulations 111, Section 29.22(b)(1)-2, as added by T.D. 6020, 1953-2 Cum. Bull. 106,

the $33,750 payment in issue here might have been subject to the $5,000 exclusion from gross income. But whether it was or not is immaterial, since the taxpayer's complaint (pars. 6, 7, and 9) and the District Court's findings of fact (Supp. R. 8–9) show that, in addition to the $33,750, the petitioner received from the Mueller Company pension trust the sum of $6,893.37 from which a $5,000 exclusion was allowed. Since the petitioner was entitled to only one exclusion of $5,000 under Section 22(b)(1), she had to seek exclusion of the $33,750 payment on the theory that it was a gift under Section 22(b)(3), *supra*, p. 2. Both in the District Court and in the Court of Appeals, her complaint was drawn and the case was decided on that narrow issue.

We submit that petitioner's further argument concerning the interpretation of Section 101(b) of the Internal Revenue Code of 1954 is also irrelevant here. The only issue in this case is whether the payment received by petitioner was excludable from her gross income as a gift under Section 22(b)(3) of the 1939 Code. If there are problems concerning the interpretation of Section 101(b) of the 1954 Code, such as that which the taxpayer envisions arising from the holding in *Rodner* v. *United States*, 149 F. Supp. 233 (S.D.N.Y.), they are not problems present in the instant case.

Petitioner cites Rev. Rul. 55–609, 1955–2 Cum. Bull. 34, issued in 1955, as "Perhaps the most significant event * * *." (Pet. 16.) This ruling gave effect in a specific instance to the general provision

in the Third Supplemental Appropriation Act, 1952, c. 369, 66 Stat. 101—

> That the foregoing death gratuity payment, and any other death gratuity payment at any time specifically appropriated by this or any other Act or at any time made out of the contingent fund of the House of Representatives or of the Senate, shall be held to have been a gift.

The significance of this statutory provision and ruling, we submit, is that Congress wanted the widows or families of its deceased members to receive tax-free payments, but thought that they would be taxable under the Internal Revenue Code. To forestall this, Congress provided specifically that such payments should be held to be gifts. If Congress had wished to provide that payments to the widows and families of all deceased employees should be gifts, it surely would have said so in a statute of general application. Instead, it enacted a measure dealing only with such payments appropriated by Congress.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1959.

U. S. GOVERNMENT PRINTING OFFICE: 1959

FILE COPY

FILED
MAR 12 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 683

GLADYS W. SIMPSON, *Petitioner*,

v.

THE UNITED STATES OF AMERICA, *Respondent*.

PETITIONER'S REPLY BRIEF

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITIONER'S REPLY BRIEF

The attention of the Court is called to the Findings of Fact and Conclusions of Law in the case of *Grace P. Reed* v. *The United States*, U. S. District Court, West. Dist. Ky., Civ. Act. No. 3625, Jan. 16, 1959. The case was brought to the attention of Counsel for Petitioner on March 9, 1959, when his office received Commerce Clearing House, Inc. 1959 Standard Federal Tax Report No. 12, dated March 4, 1959, which reports the Findings and Conclusions of the Court in paragraph 9264 at page 71,565.

The *Reed* case justifies this Reply to Respondent's Brief for the United States in Opposition to the Petition in the instant case.

For purposes of the petition in the instant case, the *Reed* case is not just one more case, the 36th case, in which a court has decided that a gratuitous payment to a widow like the payment to petitioner in the instant case, is a gift and as such is specifically excludible from her gross income for Federal income tax purposes. The *Reed* case is significant because the payment to the widow there in question was made by her deceased husband's employer in the taxable year 1956 and therefore presented the question whether the payment was a gift excludible from gross income under Section 102(a) of I.R.C. 1954. In holding that the payment to Mrs. Reed was a non-taxable gift, the District Court stated the following conclusion of law, among others:

> "4. Section 102(a) of the Internal Revenue Code of 1954 contains the provision (as did the comparable section, 22(b)(3), of the 1939 Code) that gross income does not include amounts received as gifts; and the meaning of that provision is not changed by the provisions of section 101(b) of the 1954 Code. It is clear that the purpose of the latter section of the 1954 Code is to eliminate the requirement (contained in the comparable section, 22(b)(2), of the 1939 Code) that certain employee death benefits must be paid pursuant to a contractual obligation in order for such benefits to quality for a $5,000 exclusion from gross income. No part of the aforesaid gift to Grace P. Reed is, by reason of section 101(b), includable in taxable income; and such gift is not subject to the limitation of the $5,000 exclusion provided in that section."

Here is support for Petitioner's argument in the instant case that the Revenue Act of 1954 did not settle the law in the respect questioned herein. See Peti-

tion, pages 9 to 17. Respondent's Brief in Opposition to the Petition states that petitioner's concern with Section 101(b) of the Internal Revenue Code of 1954 "is difficult to understand" (page 7) and it concludes that petitioner's argument concerning the same is "irrelevant here" because "The only issue in this case is whether the payment received by petitioner was excludable from her gross income as a gift under Section 22(b)(3) of the 1939 Code." (Page 8). Of course, petitioner's argument was not presented as an argument on the merits of her case but was presented as a reason why the Court should grant her petition for certiorari, and as such her argument is indeed highly relevant. The unsettled state of the applicable law under the 1939 Code continues under the 1954 Code. The District Court in the *Rodner* case (Pet. pages 5-6) expressed the labored dictum that the 1954 Code settled the law,—subjected "gifts in the form of death benefits" to the Section 101(b) $5,000 limitation. The District Court in the *Reed* case briefly decided that this isn't so,—that such gifts are excludable from gross income under Section 102(a) of the 1954 Code.

To argue in the face of such an unsettled state of the law before and since the effective date of the 1954 Code, as does Respondent in the first paragraph of its Argument on page 6 of its Brief in Opposition, that the instant case presents "no question of general importance," is as untenable a proposition as the points and authorities cited in support thereof by Respondent are utterly irrelevant. The instant case presents no question whether the payment to petitioner was "income" includible in "gross income" as defined in Section 22(a) of the 1939 Code. As Respondent itself

emphasizes, and correctly so, on page 8 of its Brief, "The only issue in this case is whether the payment received by petitioner was excludable from her gross income as a gift under Section 22(b)(3) of the 1939 Code." Hence, the *Glenshaw Glass Co.* case cited by Respondent is utterly irrelevant. So is the *Jacobson* case cited by Respondent utterly irrelevant. Respondent obviously isn't merely seeking a narrow construction of the word "gift" as it is used in Section 22(b)(3) of the 1939 Code. Respondent is seeking a nullification by the courts of the specific exclusion provided by Congress in that section of the 1939 Code and in the comparable section of the 1954 Code, namely Section 102(a), in all cases of gratuitous payments to widows like the payment to petitioner in question. The Courts in 36 cases have steadily held that such payments are gifts excludible from the widows' gross incomes as provided by the clear language of the statute. In only *one* analogous case, the instant case, has a court decided that such payment constitutes taxable income to the widow.

Respondent contends that there is no conflict between the decision of the court below in the instant case and the decisions of the C.A. 6th and the C.A. 4th in the *Bankston* and the *Bounds* cases, because the decision in the instant case is distinguishable both on the facts and on Respondent's "theory that the petitioner received compensation which her husband earned prior to his death knowing that if he remained in the employ of the corporation it would undoubtedly make the payment to his widow pursuant to a long-standing, formalized plan." So, too, Respondent thinks the instant case is distinguishable on the facts from the 18 District Court cases and the 15 Tax Court

cases cited or referred to on pages 4-5 of the Petition. (Resp. Br. pages 6-7) *Petitioner contends that the only material distinction is that the payments to the widows in the other 36 cases were held by the Courts to be tax-free gifts, while the C.A. 7th held that the payment to her is taxable income.*

Finally, in the last paragraph of its Brief, on pages 8 to 9, Respondent adds to the significance of Rev. Rul. 55-609, as Petitioner sought to point it out on pages 10 and 16 of the Petition. Petitioner did not express or imply that Rev. Rul. 55-609 was merely the work of supererogation, as the peremptoriness of the statutory provision quoted on page 9 of Respondent's Brief might suggest. The significance of Rev. Rul. 55-609 is, as was adverted to at the top of page 10 of the Petition, that it drew attention to a positive indication that Congress was aware of I.T. 4027 (quoted from in part on page 12 of the Petition), and did *not* approve of it. Indeed, on page 9 of its Brief Respondent says that the significance of the statutory provision is that Congress thought that the death gratuity payments to widows or families of its deceased members "would be taxable under the Internal Revenue Code," so, "To forestall this, Congress provided specifically that such payments should be held to be gifts."

WHEREFORE, petitioner continues her prayer that a writ of certiorari issue to review the decision of the Court of Appeals for the Seventh Circuit.

Respectfully,

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